RYODEN (M) SDN. BHD.

v.

SUN CHONG LAND DEVELOPMENT

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. DI-23-1040-87]
10 DECEMBER 1991

TRADE AND INDUSTRY: *Factories & Machinery - Supply and installation of lifts and escalators - Statutory requirements - Failure to obtain prior approval - Effect of - Meaning of 'machinery' and 'owner' - Delegation of duty to obtain approval - Terms of agreement - Plain meaning of the words in the Act - Strict compliance - Payment of prescribed fees - Not an alternative requirement - Factories and Machinery Act, s. 36(1) - Factories and Machinery (Electric Passenger and Goods Lift) Regulations 1970, reg. 6*

Pursuant to a contract entered into with the defendant, the plaintiff agreed to supply and install two Mitsubishi passenger lifts, one passenger lift and four escalators upon the plaintiff's general conditions of sale for the sum of RM838,000. The defendant paid the plaintiff and there was a balance outstanding of RM575,800. This was the plaintiff's claim for the said sum.

In its statement of defence, the defendant did not dispute the signing of the contract but averred that the plaintiff was in breach of the said contract by delivering the equipment late. In its counterclaim the defendant alleged that in view of the breaches by the plaintiff the defendant had suffered loss and damage. It was further alleged by the defendant that the plaintiff had failed, omitted or neglected to obtain the necessary approval from the appropriate authorities for the installation of the lifts and therefore had contravened the Factories and Machineries Act.

This was the plaintiff's appeal against the decision of the Senior Assistant Registrar refusing to order final judgment against the defendant under O. 14 of the RHC.

Held:

[1] Subsection 1 of s. 36 of the Factories and Machinery Act (the Act) requires the "owner" to apply for the requisite approval. In the present case the defendant was the owner of the lifts within the meaning of reg. 6 of the Factories and Machinery (Electric Passenger and Goods Lift) reg. 197 (the Regulations). Accordingly it is the responsibility of the defendant to seek the written approval of the Inspector for the installation of the lifts. In addition, para. 2 of the conditions of sale states that the seller is to undertake to obtain the necessary approval.

[2] It is clear from the language of the subsection that without the written approval of the Inspector no person can instal any machinery. In other words the approval must be obtained before a person is allowed to instal the machinery.

[3] Section 36(1) of the Act and reg. 6 of the Regulations must be strictly complied with irrespective of whether a written approval had been given in respect of the same model in another building. The second requirement as to the payment of the prescribed fees is to be complied with after the lift has been installed and is not an alternative requirement.

[4] On the evidence no prior approval was obtained before the lifts and the escalators were installed. In the circumstances the plaintiff was in breach of its obligations under the terms of the agreement.

[Plaintiff's appeal dismissed.]

Legislation referred to:
Factories & Machinery Act 1967 ss. 2, 34, 36(1)
Factories and Machinery (Electric Passenger and Goods Lift) Regulation 1970, reg. 6, 8, 12

For the plaintiff - S.S. Muker; M/s. Lovelace & Hastings
For the defendant - Paul Ong Teng Kek; M/s. Paul Ong & Associates

JUDGMENT

Zakaria Yatim J:

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar given on 15 September 1987, who refused to order final judgment against the defendant under O. 14 of the Rules of the High Court, 1980 for the sum of RM575,800 with interest at the rate of 8% per annum from 24 June 1986, to the date of realisation and costs including costs of the application.

The plaintiff is a limited liability company incorporated in Malaysia and having its registered office at Wisma Yan, Jalan Selangor, Petaling Jaya. The defendant is also a limited liability company incorporated in Malaysia having its registered office on 1st. Floor, No. 1, Jalan Salleh, Muar, Johor.

The plaintiff's case is that, by a contract entered into between the plaintiff and the defendant on 22 January 1985, the plaintiff agreed to supply and install two Mitsubishi Passenger Lifts, one passenger lift and four escalators at a twenty-storey building at Jalan Leong Yong, Segamat, upon the plaintiff's general conditions of sale for the sum of RM838,000. It was an express term of the contract that payment was by way of progress payment based on the work done and materials delivered to the site. The plaintiff claims that the lifts and the escalators had been duly supplied and installed on the said building. The value of work done and materials delivered to the site by the plaintiff under the contract was RM742,700. The defendant paid the plaintiff RM166,900 leaving a balance of RM575,800 still due and owing to the plaintiff. On 17 June 1986, the plaintiff through its solicitors sent a letter demanding payment of the said sum of RM575,800. Despite repeated demands the defendant did not pay the plaintiff the said sum. The plaintiff's claim was therefore for a sum of RM575,800 together with interest thereon at the rate of 8% per annum from 24 June 1986 to the date of realisation and costs of the action.

The defendant in its statement of defence, did not dispute signing the said contract but averred that the plaintiff was in breach of the said contract by delivering the equipment late. The defendant also averred that the plaintiff was in breach of a subsequent agreement dated 31 January 1986, to complete the contract inclusive of testing and commissioning for the lift and escalators by 15 March 1986 and the other two lifts by 15 April 1986. The defendant admitted having paid the plaintiff the sum of RM166,900 owing to the plaintiff, but denied the rest of the allegations contained in the statement of claim. In its counterclaim, the defendant alleged that in view of the breaches by the plaintiff, the defendant had suffered loss and damage. The defendant's counterclaim was for the sum of RM5,705,130. The defendant also asked for an "... injunction that the plaintiff complete the installation, testing and commissioning, of the said lifts or part there of ..." The defendant asked for another ... injunction that the plaintiff hand over all that is necessary to the defendants or its agent to enable the defendant or agent to complete the installation, testing and commissioning of the lifts or part there of ...

In addition, the defendant asked for specific performance of the said contracts. The defendant was also asking for general damages and interest at 8% from 15 April 1986, till realisation and costs.

The defendant, in its affidavit affirmed on 19 August 1987, alleged that the plaintiff had failed, omitted, neglected to obtain the necessary approval from the appropriate authorities for the installation of the lifts. Mr. Paul Ong Teng Kek, in his written submission stated that the "... duty of the plaintiff here is a composite one and its failure to procure the written approval per s. 36 (1) of the Factories and Machinery Act 1967... is fatal." He went on to state that the defendant's ... objection is serious. Since no plans were submitted for the installation of the lifts and escalators no approval could be forthcoming and since no approval was forth coming the defendant could not get the Certificate of Fitness "... for the building ..." He further submitted that the defendant could be held criminally liable - under the provisions of the Factories & Machinery Act.

It is now necessary to examine the provisions of s. 36 of the Factories and Machinery Act. The Section states:

> 36.(1) No person shall instal or cause to be installed any machinery except with the written approval of the Inspector and for the purpose of obtaining the approval there shall be submitted to the Inspector such particulars as may be prescribed.
>
> (2) When any machinery in respect of which a certificate of fitness is prescribed has been installed written notice shall be served on the Inspector who shall as soon as conveniently may be make an inspection thereof and, if the machinery complies with this Act, issue on payment of the prescribed fee a certificate of fitness in the prescribed form.
>
> (3) Written notice in the prescribed form shall be served on the Inspector before any machinery other than machinery in respect of which a certificate of fitness is prescribed or which is specified in any written notice served on the Inspector pursuant to s. 34 is first used in a factory and no such machinery shall, except with the written permission of the Inspector, be used until the expiry of one month after the service of written notice under this subsection.
> (Emphasis added)

The word "machinery" in s. 36(1) is defined in s. 2 of the Act to include "hoisting machines." Under s. 2, a " hoisting machine " means "...a lift, escalator..." escalators. It is clear therefore, the word "machinery" in s. 36 (1) includes lifts and escalators.

Subsection (1) of s. 36 does not specify who should obtain the written approval of the Inspector to instal the machinery and who should submit the particulars relating to the machinery to the Inspector. At the hearing of the appeal reference was made to reg.6 of the Factories and Machinery (Electric Passenger and Goods Lift) Regulations 1970. Regulation 6 states,

> Pursuant to subsection (1) of s. 36 of the Act, relating to the purpose of obtaining approval for the installation of a lift, the owner shall furnish the Chief Inspector with the following each of which shall be in duplicate:
>
> (a) ... the dimensions and particulars of the lift...
>
> (b) drawings showing the ... particulars and finished sizes ...
>
> (c) ... lift manufacturer's certificates ...

It is to be noted that reg. 6 refers to lifts, and does not refer to escalators. In my view, under subsection 1 of s. 36, the owner has to apply for the approval of the Inspector before installing the lifts as well as the escalators. The owner has to furnish the particulars specified in reg.6 to the Inspector in respect of an application to instal lifts. The word "owner" is defined in s. 3 of the Act as follows:

> 'Owner' means the person for the time being receiving the rents or profits of the premises or machinery in connection with which the word is used, whether on his own account or as an agent or Trustee for any other person or who would so receive the same if the premises or machinery were leased.

By the contract of sale, the plaintiff is the seller and the defendant is the buyer of the lift equipment. I am satisfied that in the present case the defendant is the owner of the lifts within the meaning of reg. 6. Accordingly, under subsection (1) of s. 36 of the Act, it is the responsibility of the defendant to seek the written approval of the Inspector for the installation of the lifts, and to submit to the Inspector the relevant particulars. It is also the responsibility of the defendant to seek the written approval of the Inspector for the installation of the escalators. There are, however, no particulars prescribed in respect of escalators.

In practice however, the owner or the buyer delegates the duty to the seller to seek the Inspector's approval and to submit the relevant particulars because the seller usually has all the specifications and the relevant particulars and drawings of a particular machinery. Such delegation is a question of fact and if a party is relying on such fact he must plead it in his pleadings. In the present case the defendant has not pleaded this fact in its statement of defence. But the plaintiff, in its statement of claim has made reference to the contract and to the general conditions of sale. The general conditions of sale is in fact exhibited to the plaintiff's affidavit affirmed on 9 September 1987. Paragraph 2 of the conditions of sale states:

> The seller undertake to file all notices to Government Department having jurisdiction over the installation and obtain and pay for all statutory licences in connection with the installation work.

In my opinion, under the above paragraph, the seller undertakes to obtain the necessary approval from the Inspector as required under subsection (1) of s. 36 and to supply the necessary particulars to the Inspector pursuant to reg. 6. The seller undertook the responsibility by virtue of the agreement between the seller and the buyer. Since this issue is alluded to in the statement of claim and in the plaintiff's affidavit, the defendant is therefore entitled to raise this issue in opposing the plaintiff's application for summary judgment.

Mr. S.S. Muker, Counsel for the plaintiff, in his written submission did not dispute that it was the plaintiff's responsibility to obtain the approval of the Inspector and to submit the relevant particulars. But he contended that under s. 36(1) it was not necessary to obtain the Inspector's approval until after the installation works had completed. In his written submission, Mr. S.S. Muker said:

> In the instant case it is my respectful submission that as installation has not been completed no approval of the Inspector is necessary at the stage when the plaintiff stopped work. No doubt if the defendants had paid monies to the plaintiff as and when due all the work would have been completed and the requisite approvals and permission obtained.
>
> Accordingly it is my respectful submission that the said section does not require any prior approval of the Inspector for the installation of machinery. As the installation work has not been completed it is still open to the plaintiff to obtain such consent at anytime before the lifts are put into operation. Consequently the plaintiff has not breached the provisions of the said section.

Muker relied on the affidavit of Encik Leong Ah Kim, a officer in Jabatan Kilang & Jentera (Ibu Pejabat) affirmed on 24 October 1991. Paragraph 3 of the affidavit states:

> 3. The Factories & Machinery Department will and has always allowed an installation of lift to commence even before the obtaining of the written approval of the Inspector under s. 36 of the Factories & Machinery Act 1967 or the submission of the First Schedule, drawings and lift manufacturer's certificates under reg. 6 of the Factories & Machinery (Electric Passenger & Goods Lifts) Regulation 1970, where installation of lift of a similar make and model has been approved previously by the Department in another project.

With respect the above paragraph is not binding on this Court. The function of this Court is to interpret the law passed by Parliament and the relevant provision of the law in the present case is s. 36 (1) of the Factories & Machinery Act.

Paul Ong Teng Kek, in his submission said that

> ... there is only one true way of interpreting s. 36(1) in that on a plain and practical reading thereof the written approval must be obtained before any installation and not after ...

In my view, the words in subsection (1) of s. 36 are clear and unambiguous. The subsection should therefore be construed according to the plain meaning of the words therein. The subsection states that no person shall instal any machinery except with the written approval of the Inspector. It is clear from the language of the subsection that without the written approval of the Inspector no person can instal any machinery. In other words the prior written approval of Inspector must be obtained before a person is allowed to instal the machinery.

The question that arises here is whether it is the intention of Parliament to allow the installation of a lift without the prior written approval of the Inspector if a lift of a similar make and model had been approved previously by the Inspector in another building. In my view the model of the lift is not the only factor to be taken into consideration when a lift is installed in a high rise building. There are other factors to be taken into consideration particularly those relating to safety. These are for example, the support for the lift, the lift well and the landing doors. These safety requirements must strictly comply with the provisions of the Act and the Regulations. Regulation 8(12) of the Electric Passenger and Goods Lift Regulations, states:

> (12) (a) Every lift machine and associated equipment shall be effectively supported.
>
> (b) Any supporting beam shall be of steel or reinforced concrete with a factor of safety of five or seven respectively, based on a total static load on the supporting structure equal to twice the maximum static load suspended from the beams plus the weight of all the apparatus resting on the beams.
>
> (c) The deflection under load of any supporting beam referred to in sub-paragraph (b) of this paragraph shall not be greater than 1/1500 of the span of such beam.

All these particulars are required to be supplied to the Inspector under the First Schedule to the Regulations.

Looking at the Act as a whole, it is clear that the Act is intended, *inter alia*, to provide for the safety of machinery (including lifts and escalators) used or installed in a building or elsewhere. This intention is reflected in the preamble of the Act which states:

> An Act to provide for the control of factories with respect to matters relating to the safety, health and welfare of persons therein, the registration and inspection of machinery and for matters connected therewith.

Since there are other factors, especially those relating to safety, to be taken into consideration when a lift is to be installed, s. 36(1) and reg. 6 must be strictly complied with irrespective of whether a written approval had been given in respect of the same model in another building.

Encik Leong Ah Kim referred to subsection 2 of s. 36 of the Act in his affidavit. In para. 6 of his affidavit he states:

> 6. If the Plaintiff had gone on to complete the installation of the lifts and escalators at the said proposed building and the said lifts and escalators comply with the Factories & Machinery Act 1967, certificates of fitness for operation and use of the said lifts and escalators would have been issued under s. 36(2) of the Factories & Machinery Act 1967, on payment of the prescribed fee.

In my opinion subsection 2 provides the second requirement (not an alternative requirement) to be complied with. I have already discussed above the first requirement under sub-section 1 of s. 36. Subsection 2 applies after the first requirement has been complied with and after the lift has been installed.

According to the evidence, the contract for the supply and installation of the lifts and escalators was entered into between the plaintiff and the defendant on 22 January 1985. In a supplementary agreement dated 31 January 1986, the plaintiff agreed to complete the installation work in the podium block of the building before 15 March 1986 and to complete the installation of the Bomba Lift in the tower block before 15 April 1986. The supplementary agreement states as follows:

> Re: Supply, Installation, Testing, Commission And Maintenance For Proposed 20 Storey Hotel On Lot 401, Segamat, Johor.
>
> This is to inform you that we want you to comply the following conditions for the above mentioned project.
>
> 1. To complete all the escalators and a lift in podium block before 15 March 1986.
> 2. The condition of item 1 should mean complete in good installation, testing and commissioning and to the satisfaction of the engineer.
> 3. To complete the Bomba Lift of the 20 storey tower block before 15 April 1986.
> 4. The item 3 completion should mean complete the mechanical, installation and the lift should be able to run.
>
> Yours faithfully,
>
> Sun Chong Land Development Sdn. Bhd.
>
> Sgd
>
> Lai Hee Sang (Managing Director).
>
> On Behalf of
> Ryoden (M) Sdn. Bhd
> Sgd
>
> I agree and accept the above requirements and conditions.
>
> Choy Hoong Kee I/C No. 4018050.

In its affidavit affirmed on 19 August 1987, the defendant averred that the plaintiff failed, omitted and neglected to complete the installation, testing and commissioning of the lifts within the time frame pursuant to the above supplementary agreement. Indeed, in the plaintiff's third progress claim dated 23 April 1986, the amount of work done up to that

date was only ten percent of the contract sum. Although the third progress claim stated that ten percent of the work was already done, the plaintiff had not submitted the necessary plans to the Inspector.

In its' further affidavit affirmed on October 1991, the plaintiff averred that on 5 February 1986, it sent the particulars prescribed under reg. 6 to the Ketua Pengarah, Jabatan Kilang & Jentera, Malaysia for the purpose of obtaining approval for the installation of the lifts and escalators. The affidavit went on to state that in mid 1987, after the commencement of the present action, upon checking with the Factories & Machinery Department, the plaintiff discovered that the Department did not receive the plaintiff's letter dated 5 February 1986, submitting the particulars prescribed under reg. 6.

What has been stated in the plaintiff's further affidavit is contrary to what is stated in a letter written by the Department to the defendant on 5 May 1987. In that letter the Department informed the defendant that the plaintiff had not submitted any plans in respect of the lifts and the escalators to the Department. The Department's letter is reproduced below:

> Pengurus,
> Sun Chong Land Development Sdn. Bhd.
> 28, Jalan Ibrahim,
> 85000 Segamat,
> Johor.
>
> Tuan,
>
> Rekabentuk Pepasangan 3 Buah Lif
>
> Dan 4 Buah Escalator Di Wisma Lai
>
> Hee Sang, Lot No. 407, Jalan Leong
>
> Yong/Jalan Mentol/Jalan Ismail, Segamat, Johor.
>
> Saya adalah diarah merujuk kepada surat tuan bertarikh 28hb. April 1987.
>
> 2. Rekabentuk pepasangan tersebut di atas tidak dijumpai dalam rekod-rekod Jabatan. Pehak Ryoden (M) Sdn. Bhd. telah mengesahkan bahawa rekabentuk pepasangan itu tidak dihantar kepada pejabat ini oleh sebab-sebab tertentu.
>
> Sekian.
> Berkhidmat Untuk Negara.
> Saya yang menurut perintah,
> Sgd (Ir. Harminder Singh)
> b.p. Ketua Pengarah,
> Jabatan Kilang dan Jentera,
> Malaysia.

After the building was completed, the defendant was unable to obtain certificate of fitness in respect of the building. This was because there was no certificate of fitness under s. 36(2) of the Act from the Factories & Machinery Department. This is evident from a letter written by the Secretary, District Council, Segamat Utara to the defendant on 2 April 1986. The letter is reproduced below:

> Tuan Pengarah Urusan,
> Sun Chong Land Development Sdn. Bhd.,
> No. 28, Jalan Ibrahim, Segamat,
> Johor.

Memohon Sijil Kelayakan Menduduki Untuk Bangunan 20 Tingkat Di atas Lot No. 407, Bandar Segamat, Segamat

Merujuk kepada permohonan tuan dalam perkara yang tersebut di atas, majlis hanyalah sokong keluarkan Sijil Kelayakan Menduduki (CFO) untuk bangunan tersebut dari Basement Bawah, Basement, Tingkat Bawah hingga tingkat- 3 sahaja dan Sijil Kelayakan Menduduki bangunan tersebut dari tingkat 4 hingga tingkat 19 hendaklah menyempurnakan lif lif bagaimana yang di kehendaki dan lif tersebut mesti perolehi sijil kelayakan daripada Jabatan Kilang dan Jentera bahrulah dapat ditimbangkan.

Sekian bagi makluman tuan.

Berkhidmat Untuk Negara.

Saya yang menurut perintah,

Sgd (Zalil Bin Hj. Baron).

Setiausaha,

Majlis Daerah Segamat Utara,

Segamat, Johor

It was only on 14 August 1987, that the plaintiff submitted to the Department all the relevant documents and drawings. On 24 November 1987, the Department gave its written approval. The letter of approval states:

Per : Pemasangan 3 buah lif untuk Sun Chong Land Development Sdn. Bhd. di Cinema & Shopping Complex, Lot 407, Jalan Leong Yong, Segamat, Johor

No. Lukisan JB - 1/84 - 10/ 1B & 2B.

Dimaklumkan bahawa pemasangan lif tersebut dibenar.

2. Sila berhubung dengan:

Pengarah,
Jabatan Kilang dan Jentera,
Tingkat 2, Blok A, Wisma Persekutuan
Jalan Ayer Molek,
80000 Johor Bharu.

apabila lif tersebut siap untuk pemeriksaan dan ujian.

I am satisfied that on the evidence, no prior written approval was obtained before the lifts and the escalators were installed. This is contrary to s. 36(1) of the Act and reg. 6. The plaintiff did not dispute that no prior approval was obtained from the the Inspector before commencing on the installation work on the lifts and escalators.

In the circumstances, the plaintiff was in breach of its obligations under the terms of the agreements.

For the reasons stated above, the plaintiff is not entitled to summary judgment as prayed in the statement of claim. The appeal is therefore dismissed with costs.

Also found at [1992] 1 CLJ 503